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Subject:—

Opinions given under the

Constitution of India.

[for Subsequent P/Is. pl. see pt. II]

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of ...

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48.	R.I.No.10734 22-6-50. O.No. 13587 26-9-50.	Question whether it is feasible under the provisions of the Constitution of India to make short time appointments in leave or deputation vacancies on the Public Service Commission in respect of the members Constitution of India.Articles, 265, 316, 318 A, 372 and 378.

49.	O.No.14330 12-10-50.	Re: Power of the Governor of the State to grant pardons reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. Article 161 of the Constitution.
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(Reference made)

BDS 16/2

ABL 12-4-56

Legal Department.

The Constitution of India refers to the powers of the Governor to be exercised in his discretion in Article 163(1) & (2), Article 166 and para 18(3) of the Sixth Schedule. Article 163(1) provides that there shallbe a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion Article 166 provides for the making of business rules for the transaction of business except that with respect to which the Governor is by or under the Constitution required to act in his discretion. Sub-para (3) of para 18 in the Sixth Schedule to the Constitution which applies to Assam only provides for the performance of the functions of the Governor of Assam in his discretion in regard to the tribal areas in Assam. It is therefore clear that so far as the actual provisions of the Constitution are concerned, except para 18 of the Sixth Schedule, there is no express provision which refers to the exercise of the powers of the Governor in his discretion. Article 163 of the Constitution of India seems however to follow the provisions of section 50 of the Government of India Act, 1935, before its adaptation by the India (Provisional Constitution) Order, 1947 That Act contained various previsions which expressly provide for cases in which the Governor can exercise his functions under the Act in his discretion. But as stated beforeexcept sub-para (3) of para 18 in the Sixth Schedule in the Constitution of India there does not appear to be any provision in the Constitution which authorises the Governor to act in his discretion. It may, however, be stated that Article 163 refers to the functions of the Governor by or under the Constitution. The expression"by the Constitution " refers to

the express provisons of the Constitution, while "under the Constitution" would refer to the orders made under the Constitution. The President is competent to make orders under the Constitution (See Articles 372 and 392). Thus the Governor of a State may be empowered to exercise his functions in his discretion by an order which may be issued by the President under Article 392 or in an adaptation made under Article 372. It is perhaps in view of this position of this power, that Article 163 refers to functions which the Governor may be required to exercise in his discretion under the Constitution. If however any order issued under the Constitution of India does not provide for the exercise of these function which the Governor in his discretion there would be no function which the Governor of the State of Bombay can exercise in his discretion.

2. It may however be stated that this does not mean that in all orders where the word 'Governor' is used in the Constitution, it means 'the Governor acting with the aid and advice of the ministers.' The expression Governor has the meaning in accordance with the context in which it is used. Thus before the formation of the Council of Ministers, the Chief Minister will have to be chosen and appointed under Article 164 and then the other ministers will have to be appointed on the advice of the Chief Minister. But so far as the appointment of the Chief Minister is concerned, the Governor will not have a Council of Ministers to aid and advise him. The appointment of the Chief Minister, therefore, is a matter in which the action of the Governor will have to be guided by certain conventions which are well recognised. It has beenwell recognised that no Constitution can ever be exhaustive and there are several matters which must be regulated by well recognised conventions. Article 164(1) also provides that the ministers shall hold office during the pleasure of the Governor. In this matter also there may be occasions when the advice of the Council of Ministers may not be available to the Governor. If the Governor finds that the

Ministery has lost the confidence of the Legislative Assembly to which it is collectively responsible, he will have to act without the aid and advice of the Council. Article 356 empowers the Governor to make a report to the President that Government cannot be carried on in accordance with the Constitution. In such a case also there may be an occation where the Governer may have to act without the aid and advice of the Council. There are cases in which the context in which the word Governor is used shows that the powers referred to can be exercised by the Governor without the aid and advice of the Council of Ministers. It is apprehended that there is a lack of precision in the drafting of some of the provisions of the Constitution.

3. H.E. the Governor in the course of his talk with Additional Secretary, Legal Department the other day referred to the question of his powers under the Constitution of India to grant pardons etc. The relevant article in this connection is article 161. Under that article the Governor of a State has been given the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any of offence against any law relating to a matter to which the executive power of the State extends. This article has however to be read with article 72. Under that article the President has the power to grant pardons, reprieves, respites or remissions of punishments or suspend, remit or commute the sentence of any person convicted of any offence in cases where the sentence is the sentence of death. The power thus given to the President does not however affect the Governor's power to suspend, remit or commute the sentence of death exercisable by the Governor under any law for the time being in force. Under sections 401 and 402 of the Code of Criminal Procedure, 1898, the Provincial Govt i.e. the Governor is given power to suspend, remit, or commute the sentence of death. The resulting position therefore, is that the Governor can, under the Constitution of India, suspend remit or commute the sentence of death; but as regards sentence other than death, his power to suspend, remit or commute such

sentences is restricted to offences against laws relating to matters to which the executive power ~~x~~ of the ~~S~~tate extends. Since in virtue of provisions of article 162 the executive power of a State extends to matters with respect to ~~which~~ which the Legislature of the ~~x~~ State has power to make laws, it will not be possible for the Governor, except in the case of the sentence of death, to suspend, remit or commute sentence of persons convicted of offence against laws relating to matters mentioned in the Union List.

Sd/- J.R. Dhurandhar.
3.1

Additional Secretary to Government.

U.R. to P. & S. D. No. 3- Confl Dated the 4th January 1950.

V.M.D./ 12.7
4c.

Office of the R.L.A.

The provisions of the Constitution of India relating to the Consolidated Fund of the State shall not apply to the Schedule of authorised supplementary expenditure for 1949-50. (Cf. article 390 of the Constitution of India.) It will be accordingly necessary, as already suggested in R.L.A's opinion No. 12483 dated 5th November 1949, to lay the Schedule of the authorised supplementary expenditure for the year 1949-50 before the Assembly during the next session on a date to be fixed by the Governor. The course suggested by Secretary, Bombay Legislature Department to communicate the authenticated expenditure by means of a circular instead of waiting till the next session of the Assembly is not correct.

Sd/- P.M.Lad.
3.1

Remembrancer of Legal Affairs.

U.R. to F.D. No. 77 dated the 4th Jan. 1950.

V.M.D./12.7
4c.

In regard to the question of the reservation of seats for women in Local Bodies, there is no provision in the Constitution of India which debars the making of such provision. On the other hand Art. 15(3) of the Constitution empowers the State to make special provision for women.

2. The Constitution of India does not contain any provision regarding all local bodies to have elections on the basis of adult franchise. There is no objection to hold elections on the present franchise basis, until new rolls on the adult franchise basis are ready. It can be provided that the new rolls which will take some time to be ready will not apply to elections for a particular period.

Sd/- J.R. Dhurandhar.

9.1

H.M. L.S.G.

V.M.D./12.7

40.

Legal Department.

The Constitution of India refers to the powers of the Governor to be exercised in his discretion in Article 163(1) & (2), Article 166 and para 18(3) of the Sixth Schedule. Article 163(1) provides that there shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Article 166 provides for the making of business rules for the transaction of business except that with respect to which the Governor is by or under the Constitution required to act in his discretion. Sub-para (3) of para 18 in the Sixth Schedule to the Constitution which applies to Assam only provides for the performance of the functions of the Governor of Assam in his discretion in regard to the tribal areas in Assam. It is therefore clear that so far as the actual provisions of the Constitution are concerned, except para 18 of the Sixth Schedule, there is no express provision which refers to the exercise of the powers of the Governor in his discretion. Article 163 of the Constitution of India seems however to follow the provisions of section 50 of the Government of India Act, 1935, before its adaptation by the India (Provisional Constitution) Order, 1947. That Act contained various provisions which expressly provided for cases in which the Governor could exercise his functions under the Act in his discretion. But as stated before except sub-para (3) of para 18 in the Sixth Schedule in the Constitution of India there does not appear to be any provision in the Constitution which authorises the Governor to act in his discretion. It may, however, be stated that Article 163 refers to the functions of the Governor by or under the Constitution, the expression "by the Constitution" refers to

the express provisions of the Constitution, while the words "under the Constitution" would refer to the orders made under the Constitution. The President is competent to make orders under the Constitution (See Articles 372 and 392). Thus the Governor of a State may be empowered to exercise his functions in his discretion by an order which may be issued by the President under Article 392 or in an adaptation made under Article 372. It is perhaps in view of this power, that Article 163 refers to functions which the Governor may be required to exercise in his discretion under the Constitution. If however any order issued under the Constitution of India does not provide for the exercise of these functions by the Governor in his discretion, there would be no function which the Governor of the State of Bombay can exercise in his discretion.

2. H.E. the Governor in the course of his talk with Additional Secretary, Legal Department the other day referred to the question of his powers under the Constitution of India to grant pardons etc. The relevant article in this connection is article 161. Under that article the Governor of a State has been given the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. This article has however to be read with article 72. Under that article the President has the power to grant pardons, reprieves, respites or remissions of punishments or suspend, remit or commute the sentence of any person convicted of any offence in cases where the sentence is the sentence of death. The power thus given to the President does not however affect the Governor's power to suspend, remit or commute the sentence of death exercisable by the Governor under any law for the time being in force. Under sections 401 and 402 of the Code of Criminal Procedure, 1898, the Provincial Government i.e.

the Governor is given power to suspend, remit, or commute the sentence of death. The resulting position therefore is that the Governor can, under the Constitution of India, suspend, remit or commute the sentence of death; but as regards sentences other than death, his power to suspend, remit or commute such sentences in is restricted to offences against laws relating to matters to which the executive power of the State extends. Since in virtue of provisions of article 162 the Executive power of a State extends to matters with respect to which the Legislature of the State has power to make laws, it will not be possible for the Governor, except in the case of the sentence of death, to suspend, remit or commute sentence of persons convicted of offence against laws relating to matters mentioned in the Union List.

Sd/- J.R. Dhurandhar.
7.11

Additional Secretary to Government.

U.R. to P. & S. D. No. 3 Confl., Dated the 4th January 1950.

V.H.D./12.7
40.

Office of the R.L.A.

The case of Government servants stands on a different footing from that of the Governors, Ministers and Members of the Legislature; for, Government servants are not required by the Constitution to take an oath as the others are. Under article 375 all officers, judicial, executive and ministerial, throughout the territory of India shall continue to exercise their respective functions subject to the provisions of the Constitution, and no oath is needed for the purpose of giving them authority necessary for discharging those functions. On the occasion of the transfer of power on the 15th August 1947, the oath was prescribed for Government servants not under the Government of India Act, 1935, or the Indian Independence Act, but apparently as a matter of administrative policy. Whether Government servants should be required to take a fresh oath now on the Independence Day is, therefore, entirely a question of policy and can best be decided on the grounds of uniformity by a reference to the Government of India.

Sd/- P.M.Lad.
16.1
Remembrancer of Legal Affairs.

V.M.D./12.7
40.

Legal Department.

The presumption made by H.P. in para one of his minute dated 13th January is correct. The Governor can suspend, remit or commute the sentence of death or other sentences only on the advice of his ministers.

2. As pointed out by H.P. in his minute, article 163 of the Constitution of India, which corresponds to original article 143, was the subject-matter of discussion in the Constituent Assembly. It would be seen from the debates that the discretionary functions which the framers of the Constitution had in view were the functions which were conferred on the Governor by the succeeding articles e.g. article 188. Under article 188, as it originally stood, power was given to the Governor to declare by proclamation that his functions in a grave emergency shall be exercised by him in his discretion. The article thus provided expressly for the exercise of the functions by the Governor in his discretion. That article was, however, deleted at the final stage.

3. In the course of debate Dr. Ambedkar, by way of illustration, also referred to other articles e.g. articles 175 and 200 for vesting the Governor with discretionary powers and he observed that article 143 would have to be read in conjunction with other articles which specifically reserved the power to the Governor. However, articles 175 and 200, which ultimately became articles 200 and 128 respectively, did not include any provision vesting in the Governor discretionary power. Original article 200, which corresponds to article 123, of the Constitution of India, is not relevant and in article 175, which corresponds to article 200, no express provision has been made by giving

discretionary power to the Governor. This article, it may be pointed out, corresponds to section 75 of the Government of India Act, 1935. Section 75 of the Government of India Act, 1935, before it was adapted by the India (Provisional Constitution) Order, 1947, did contain a provision giving the Governor power to declare in his discretion either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the Governor General. Section 75, as it stands at present, omits the discretionary power given to the Governor and article 200 of the Constitution of India, which corresponds to section 75, does not similarly contain any provision giving discretionary power to the Governor. The result is that whatever course H.E. the Governor, F has to take under article 200 will have to be taken in accordance with the advice of the ministers. As already pointed out the only provision which expressly confers upon the Governor the power to perform his functions in his discretion is contained only in sub-para (3) of para 18 in the Sixth Schedule, but that para provides for the performance of the functions of the Governor of Assam in his discretion inregard to the tribal areas in Assam.

Sd/- J.R.Dhurandhar.
18.1
Additional Secretary to Government.

U.R. to P. & S. D. No. 54-Confl., Dated the 19th Janua

V.M.D./12.7
4c.

Legal Department.

It is no doubt true that Article 3 of the Agreement, which was entered into with the Ruler, provides that 'the Ruler shall be entitled to the full ownership and enjoyment of all the private properties as distinct from the State properties belonging to him on the date of this agreement.' But that does not mean that all properties which are held to be the private properties of the Ruler will be subject to the same rights in regard to ownership or enjoyment. When the agreement provides for a distinction between the property of the Ruler and the property of the State, the property of the Ruler can be of two kinds, i.e. (1) the property held by him qua a Ruler, and (2) the property held by him as a private individual. In regard to the property of the latter class i.e. the property held by him as a private individual a Ruler may have absolute right of disposal but in regard to the former class of property, it cannot be held that he has such absolute right which will be inconsistent with the custom or practice followed in regard to such property. For instance, one of the properties which is mentioned in the List of the private property of the Ruler at page 5 ℞ is the 'Cremation Ground of the Ruling Family.' It would not be open to the Ruler to contend that the said ground is of his absolute ownership and he can alienate it. The enjoyment of that property will be in accordance with the custom of the family. Similarly, with regard to this property from which the Ruler and his predecessor used to obtain the supply

of fuel for house-hold purposes must be regarded as an apanage to his position as a 'Ruler' and he would have to maintain it for that purpose. It does not, therefore, seem necessary to make any change in the decision already arrived at. If necessary, the point may be brought to the notice of the Government of India.

Sd/- J.R. Dhurandhar.
17.2

V.M.D./ 12.7

4c.

Goans. Attention is invited to R.L.A's opinion No. 1249, dated 10th September 1949 in which the legal position in regard to the claim of citizenship by Goans has been explained. In addition to residence in the territory of India for not less than five years a Goan will have to prove that he had acquired domicile in the territory of India at the commencement of the Constitution. No Goan can be enrolled as a citizen of India unless he has proved his domicile in the territory of India at the commencement of the Constitution. The right of citizenship is the most valuable right under the Constitution, and carries with it privileges which cannot be lightly conferred. Enrolment of persons who are not entitled to citizenship will inevitably lead to difficulties and complications in the matter of elections and offices. The name of a Goan who does not satisfy the requirements of Article 5 will have to be removed. The question may be referred to the Government of India if it is apprehended that such removal will lead to ~~xii~~ political repercussions.

Pathans. The view taken by the Political and Services Department seems to be correct. If a person fulfils the condition specified in clauses (a) and (b) of Article 6, he can be considered to be a citizen of India. As pointed out by P. & S. D. clause (b) of Article 6 does not require that a person should have migrated to the territory of India due to disturbances or fear of disturbances. As worded clause (b) would apply to any person who has migrated to India before 19th July 1948 irrespective of the fact whether he is a displaced person or not.

Displaced persons. In view of para (ii) of clause (b) of Article 6 it is necessary that a person who has migrated to the territory of India on or after the 19th day of July 1948 should be registered as a citizen of India in accordance with the provisions of that para. It is true as pointed out by P. & S.D. that there will be

difficulty in distinguishing between persons who have migrated to India before the 19th July 1948 from those who migrated after that date. In the absence of offiofficial debates on this article, it is not possible to state why a distinction has been made between persons who have migrated before and after 19th July 1948. The question arising in respect of these displaced persons may be referred to the Government of India.

Sd/- P.M.Lad.
3.2
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 1599, dated the 4th February 1950.

V.H.D./12.7
4c.

95
-145

POST HOSEDIATE

GOVERNMENT OF INDIA
Ministry of Law.

No. F. 26/49-C.

From:

K.Y. Dhandarkar,
Joint Secretary to the Govt. of India.

To:

The Chief Secretary to the Government of Bombay
Bombay

New Delhi, dated the 21st December 1949.

Sir,

I am directed to refer to this Ministry's letter No. F. 26/49-C dated the 14th December, 1949, on the subject of Orders that may be necessary under Article 392 of the Constitution for the purposes of removal of difficulties and expedite a reply thereto immediately, in any case, not later than the 7th January, 1950. It is important that replies should be received by this date positively, as otherwise it may be too late for taking the necessary action, if any.

Yours faithfully,

Sd/- K.Y.Dhandarkar.
Joint Secretary to the Govt. of India.

V.M.D./12.7
40.

Below copy of letter from Government of India,

Ministry of Law, No. F. 26/49-C dated the 31st December 1949.

IMMEDIATE.

No. 95
Legal Department,
Bombay Castle, 4th January 1950.

Forwarded with compliments to the Finance Department for necessary action.

Sd/- S.L.Chaudhari
4.1
Officer on Special Duty.

Copy to.-

P.S. Nadkarni, Esquire,
Special Officer (Reconstruction Finance),
Finance Department.

V.M.D./12.7
4c.

IMMEDIATE.
CONFIDENTIAL.

No. P.S.G.- 3379.

FROM

L. M. Nadkarni, Esquire, I.C.S.,
PRIVATE SECRETARY TO THE GOVERNOR OF BOMBAY.

To

The Secretary to the Government of Bombay,
Legal Department.

GOVERNMENT HOUSE.

BOMBAY 6. Dacr. 26, 1949

Subject: Action preparatory to the introduction of the Constitution of India.

....

Sir,

With reference to your endorsement No. 14843, dated December 20, 1949, on the above subject, I am to say that on an examination of the provisions of the Constitution of India, it does not appear that any action is required to be taken by this office *ab initio*.

2. As regards section 392 of the Constitution of India, I am to invite attention to my letter No. PSG-3360, dated December 23, 1949, to the Chief Secretary to the Government of Bombay in the Political and Services Department, a copy of which is enclosed for ready reference, in connection with the discretionary function of the Governor contemplated by sub-sections (1) and (2) of section 163.

Yours faithfully,

Sd/- L.M.Nadkarni.
Private Secretary to the Governor
of Bombay.

V.M.D./12.7
40.

C O P Y

CONFIDENTIAL.

D.O. No. PSG-3360.

Government House
Bombay 6.
December 23, 1949.

Dear Mr. Bhat,

Will you kindly refer to sub-sections (1) and (2) of section 163 of the Constitution of India, as recently enacted, which read as follows:-

" 163 (1). There shall be a Council of Ministers with a Chief Minister as the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2). If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion."

So far as we have been able to ascertain from a perusal of the Constitution, unlike the Government of India Act, 1935, as it stood before adaptation, there is no provision which specifically requires the Governor to act in his discretion in any particularised case. It is noted, too, that in many cases the provisions relating to Governors follow those pertaining to the President, but section 74, unlike section 163, does not refer to the discretionary functions of the President.

His Excellency will be grateful if, with the permission of the Honourable the Premier and the Honourable the Law Minister, you will kindly have the position regarding the discretionary functions of the Governor examined carefully by the Remembrancer of Legal Affairs of the communicate to me, for His Excellency's information, his and your view and the views of the Honourable the Law Minister and the Honourable

Yours sincerely,

(Sd.) L. M. Nadkarni.

M.D. Bhat, Esquire, I.C.S.,
Chief Secretary to the Government of Bombay
Political and Services Department,
Secretariat,
BOMBAY.

V.M.D./14.7
4c.

Below statement of the Education Department showing action to be taken on the articles of the New Constitution.

No. 1281
Legal Department,
Bombay Castle, 28th January 1950.

Forwarded with compliments to the Political and Services Department in continuation of this Department No. 235, dated the 6th January 1950, for necessary action.

Sd/- S.L.Chaudhari.
25.1
for Additional Secretary
to Government.

V.M.D./12.7
4c.

Below copy of a Statement prepared by the Legal Department showing the action required to be taken by the Education Department in connection with Constitution of India.

No. 3545/46-H,
Political and Services Department,
Bombay Castle, 2nd February 1950

Forwarded with compliments to :-

The Education Department for necessary action.	:	
The Private Secretary to the Governor,	:	
All other Departments of the Secretariat,	:	for information.
The Bombay Legislature Department.	:	

In continuation of Political and Services Department endorsement No. 3545/46-H, dated the 9th January 1950.

By order of the Governor of Bombay,

J. CHAVES.

For Chief Secretary to the Government of Bombay
Political and Services Department.

V.M.D./12.7
4c.

Office of the R.L.A.

Article 5 of the Constitution of India provides that at the commencement of the Constitution every person who has his domicile in the territory of India and

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement;

shall be a citizen of India.

2. The question whether a person has acquired domicile in any territory has been fully considered in R.L.A's opinion No. 4623, dated 6th May 1947. As stated in that opinion the question of domicile is a mixed question of fact and law. It is only when the relevant facts have been ascertained that the Court or authority is in a position to determine where a person is domiciled. The only principle which can be and to have acquired a new one, it is necessary to show that there was both the factum and animus. If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. There must be not only the physical fact of residence but the mental fact or purpose or intention to reside. Expression of intention, written or oral, may be given in evidence and to that extent a declaration may be useful. But that is not the sole test of the acquisition of domicile. If, therefore, any person has made a declaration of his intention to acquire domicile in a territory of India even after 26th January 1950, that will not debar him from proving by other means that at the commencement of the Constitution he had acquired domicile in the territory of India. The statement made by the Collector of Bombay in para. 1 of his letter of 8th February 1950 that a foreigner seeking citizenship under clause (c) of article 5 must make and deposit with the competent authority a declaration in

writing .....

writing on or before the 25th January 1950 is not, therefore, correct. If a foreigner has made such declaration before 26th January 1950, that declaration may be considered as a piece of evidence which can be taken into consideration in determining whether he has acquired domicile at the commencement of the Constitution; but if he has not made any such declaration it does not necessarily follow that he has not acquired domicile in the territory of India at the commencement of the Constitution. The question whether a foreigner has acquired a domicile in the territory of India does not thus merely depend upon his declaration or the obtaining of a domicile certificate either before or after the commencement of the Constitution. To decide whether any foreigner has in fact acquired domicile in the territory of India at the commencement of the Constitution it will be necessary to go very carefully into each individual case. Since this question is of all-India importance and it is necessary to follow a uniform policy, it is suggested that the matter may be referred to the Government of India and they be asked to give instructions in this matter for the guidance of the State Governments.

3. As pointed out in R.L.A's opinion No. 124-Confl., dated 16th February 1950, a person who is a citizen of India is not a foreigner within the meaning of the Registration of Foreigners Act, 1939. The Registration of Foreigners Act will have, therefore, no application to such person and he can claim exemption from registration under that Act.

Sd/- P.M.Lad
8.3
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 3277, dated the 9th March '50.

V. H.D./12.7
40.

Office of the R.L.A.

It appears from these papers that some Pathans residing in India have been asked to get themselves registered under the Registration of Foreigners Act, 1939 on the ground that they are foreigners. The Pathans claim that they are citizens of India on the ground that they have been residing in India since over five years and are, therefore, exempt from registration. The question for consideration is whether their claim is valid.

Section 2 of the Registration of the Foreigners Act, 1939 as adapted by the Adaptation Order issued under the Constitution of India defines 'foreigner' as denoting a person who is not

(i) a British subject domiciled in the United Kingdom; or

(ii) a Citizen of India; or

(iii) a person duly appointed by a foreign Government to exercise diplomatic ~~fun~~ functions; or

(iv) a Consul or a Vice-Consul.

It is obvious from the definition of 'foreigner' given in section 2 of the Act that a person who is a citizen of India is not a foreigner within the meaning of the Registration of Foreigners Act and would, therefore, be exempt from registration under the Act. To determine the question whether a Pathan is a citizen of India, it is necessary to see whether his case falls either under article 5 or 6 of the Constitution of India. Under article 5, a person claiming to be a citizen of India would have to prove that

(i) at the commencement of the Constitution i.e. 26th January 1950 he had acquired a domicile in the territory of India, and

(ii) ..

(ii) he was born in the territory of India or either of his parents was born in the territory of India; or he has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

Under this article mere residence of a person in the territory of India for over five years of his birth or the birth of either of his parents in the territory of India is not sufficient. Coupled with residence or birth there must be the acquisition of domicile at the commencement of the Constitution.

Article 6 which follows next provides for citizenship of persons who have migrated to India from Pakistan. Under that article it is not necessary to prove acquisition of domicile at the commencement of the Constitution. It is sufficient if a person who has migrated to India from Pakistan proves that

(i) (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before 19th July 1948, he has been ordinarily resident in India since the date of his migration; or

(ii) in the case where such person has so migrated on or after the 19th July 1948, he has been registred as a citizen of India.

Under the combined effect of articles 5 and 6 a Pathan who has migrated to India before 19th July-

July 1948, will have to prove in order to claim citizenship of India that his case falls either under article 5 or under article 6. If he proves that his case falls under article 5 he need not have recourse to article6. If,however, his case does not fall under article 5 he can take advantage of article6. This is however true of a Pathan who has migrated to India from Pakistan. Pathans who have migrated to India from a territory other than Pakistan, say, Afghanistan, can claim their citizenship only under article 5. The result is that if any Pathan proves that his case falls either under articles 5 or 6 he can claim exemption from registration under the Registration of Foreigners Act, 1939.

Sd/- P.M.Lad.
14.2.

Remembrancer of Legal Affairs.

U. R. to P. & S.D. No. 124-Confl. dated the 16th February 1950.

V.M.D./12.7
4c.

The position of Parliamentary Secretaries under the Government of India Act, 1935, has been fully considered in R.L.A's opinion No. 350-Confl. dated 1st July 1948. The Constitution of India has not in any way affected that position. Under Article 154 of the Constitution, the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. As pointed out in paragraph 7 of the above mentioned opinion, Parliamentary Secretaries cannot be treated as officers subordinate to the Governor for the purpose of discharging the executive function. They hold what is purely a political office for purposes which are not connected with the discharge of functions involving the exercise of executive power. In that view it will not be constitutionally feasible to assign to them the official functions of inquiring into and requiring the speedy disposal of cases and prompt replies.

* Which reproduces section 49 of the Govt. of India Act, 1935.

Sd/- P.M.Lad.
4.4
Remembrancer of Legal Affairs.

V.M.D./13.7
4c.

Office of the R.L.A.

The expression "law in force in the territory of India immediately before the commencement of this Constitution" in Article 372 will include the statutory rules in force. In virtue of the provisions of that Article the Bombay (Crimes of Violence) Information Non-disclosure Rules, 1937 (pp. 19-22 of H.D. file 897) will continue in force notwithstanding the fact that the Government of India Act, 1935, under which they were made has been repealed by the Constitution. It is true that under article 372 the law in force immediately before the commencement of the Constitution continues in force subject to the other provisions of the Constitution, but there does not appear to be any provision in the Constitution under which the Rules in question are or can be deemed to have been repealed or annulled.

Sd/-P.M.Lad.
13.4
Remembrancer of Legal Affairs.

U.R. to H.D. (Spl.) (1), No. 250-Condl., dated 13th April 1950.

V.M.D./13.7
40.

Office of the R.L.A.

Article 15 of the Constitution contains the fundamental right, namely, that the State shall not discriminate against any citizen on grounds only of religion, race caste, sex, place of birth or any of them. Clause (3) of that Article says that nothing in the Article shall prevent the State from making any special provision for women and children. Had this Article stood by itself, there could be no manner of doubt that it would not be permissible to exclude females from any educational institution on the ground of their sex. It is interesting to point out that during the course of the debate on this Article, an amendment was moved to include specifically schools, colleges, etc., in clause (2) (b) and the Hon'ble Dr. Ambedkar even went to the length of saying that the word "public" in the expression "places of public resort" is used in a special sense and that a place is a place of public resort provided it is maintained wholly or partly out of State funds. Apparently, it is because of this explanation by the Hon'ble Minister for Law that the amendment was negatived. The understanding, therfore, was, what the words of the Article also support, that no ~~the~~ female could be excluded from any educational institution, although separate educational institutions meant exclusively for females could be established. Article 29 is to the effect ~~that~~ that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. The omission of the word "sex" in this provision does not in my opinion derogate from the plenitude of the right conferred earlier by Article 15. Article 29 figures under the head "Cultural and Educational Rights" and deals with protection of interests of minorities not in the popular sense of the term but in the sense of a section of the citizens. The

intention of the Article is not to whittle down the right given by Article 15. It cannot be read as a proviso or a qualification to Article 15. Its object is to assure another right from the point of view of the cultural interest of a section of the citizens, and to that right sex had no relevance. In that sense it is an additional affirmation of a right which to a certain extent is implicit in ~~Article~~ Article 15. I am, therefore, of opinion that Article 29(2) does not affect the right given to females by Article 15 of being entitled to admission to institutions maintained by the State. The view taken by the Secretary, E.D., is correct.

Sd/- [illegible].M.Lad.
3.3
Remembrancer of Legal Affairs.

U.O. to E.D. No. 4475 dated 3rd April 1950.

V.M.[illegible]./13.7
4c.

Office of the R.L.A.

From the ruling of the Honourable Speaker (Honourable Mr. Mavlankar) dated the 28th March 1938, Bombay Legislative Assembly Debates Vol. 3 Part I it will be noticed that Honourable Speaker has agreed to consider the question of establishing a convention, if at all it is possible to establish such a convention consistently with the previsions of the Act. Before the coming into force of the Government of India Act, 1935, the Bombay Legislative Council Rules made under Section 72D (5) of the Government of India Act, 1919 contained a provision in rule 32 to the following effect.

"Provided that when funds to meet proposed expenditure on a new service can be made available by re-appropriation a demand for the grant of a token sum may be submitted to the vote of the Council and if the Council assents to the demand, funds may be so made available."

2. No corresponding rule was made under the Government of India Act, 1935, as in the opinion of the Government of India section 81 of the Act did not contemplate the submission of a token demand. It is not known whether the system of token demand prevelent in some other Provinces found support in the rules of the such Provincial Assemblies of was the result of convention set up in spite of the previsions of the Constitution Act of 1935. In any case in view of the provisions of clause (2) of Article 205, which correspond to section 81 of the Government of India Act, 1935, and which section 31, according to the view the Government of India did not contemplate the submission of a token demand it would be difficult to persuade the Honourable Speaker that a preposed convention can consistently with the provisions of the Constitution be established.

3. A similar rule has been made in the Rules of Procedure and Conduct of Business in Parliament (Vide rule 133 published at pp. 775-306, Gazette of India, Extra-ordinary dated the 14th February 1950.) Finance Department should consider whether a rule on the lines of this rule should be made by the Legislature of the State. Such rule will not however be covered by the Constitution of India but since Parliament has seen no objection to making such a rule the State Legislature may also agree to make a similar rule. The rule can be included in the present rules of procedure by means of adaptations which the Speaker of the Legislative Assembly is authorised to make under Article 208(2).

4. By way of comparison it may be pointed out that in Great Britain under the Parliamentary practice as established by conventions "token" supplementary vote is required in certain cases. (Vide p. 681 of May's Parliamentary Practice, 14th Edition). But that country is not governed by the provisions of any written Constitution.

Sd/- P.M.Lad.
29.3
Remembrancer of Legal Affairs.

U. R. to F.D. No. 4318 dated the 29th March 1950.

V.M.D./13.7
4c.

Legal Department.

When Mr. Hulkoti was appointed under Notification No. 1817/34-I, dated the 3rd August 1949 to officiate as a member of the Bombay Public Service Commission vice Mr. Fyzee, he was about 62 years of age (p. 72). Under Regulation 5 of the Bombay Public Service Commission (Conditions of Service) Regulations, which were applicable to Mr. Hulkoti, he could continue to hold office till he attained the age of 65 years. In view of the provisions of Article 378(2), Mr. Hulkoti can get the benefit of Regulation 5 and, if Mr. Fyzee's lien is extended up to July 1952, Mr. Hulkoti can continue to be the member of the Public Service Commission till that date. If, however, on any account Mr. Hulkoti is not continued in the office he holds and any other person is appointed as a member of the Commission, he will be entitled under Article 316(2) to hold the office for a term of 6 years from the date on which he enters the office or until he attains the age of 60 years, whichever is earlier.

Sd/- J.R. Dhurandhar.
13.4
Additional Secretary to Government.

V.H.D./13.7
40.

Legal Department.

Under Political and Services Department Notification No. 1817/34-I of 3rd August 1949 (page 39 ante the services of Mr. Fyzee were placed at the disposal of the Government of India for a period of one year with effect from 11th August 1949. Under the same Notification Mr. Hulkoti was appointed to officiate as a Member of the Bombay Public Service Commission vice Mr. Fyzee. In accordance with this notification Mr. Fyzee was allowed to retain his lien on his post as a Member of the Public Service Commission for a period of one year. If now Mr. Fyzee's lien is extended up to July 1952, Mr. Hulkoti can continue to officiate vice Mr. Fyzee till that date. This will not involve any fresh appointment to the post since Mr. Hulkoti's continuance as a Member of the Public Service Commission will be authmatic on the extension of Mr. Fyzee's lien. As already pointed out, if Mr. Hulkoti is continued vice Mr. Fyzee he gets the benefit of Regulation 5 and he can continue to be a member of the Public Service Commission till July 1952.

Sd/- J.R.Dhurandhar.
22.4
Additional Secretary to Government.

V.M.D./13.7
4c.

OFFICE OF THE R.L.A.

Since the Government of India Act, 1935, came into force, the Standing Finance Committee in the Province was discontinued. The reasons for its discontinuance were as follows: A Standing Finance Committee of the kind which functioned before the Government of India Act, 1935, could not be imposed on the Council of Ministers by the Governor against their wish as part of the constitutional machinery; for the Provincial Executive dependent on its party following in the Legislature would not be willing to anticipate its budget proposals by prior reference of their expenditure scheme to a Standing Committee of the Legislature. The view was, therefore, generally taken that under the Government of India Act, 1935, there was no place for the Standing Finance Committee and such Committees were discontinued in the Provinces.

2. The Committee was retained at the Centre because constitutionally full responsible government did not obtain at the Centre and, therefore, it was necessary to take the Legislature into confidence through its machinery.

3. In his budget speech of 1950-51 the Finance Minister, Dr. Matthai, has announced that he would like the Standing Finance Committee to continue even under the new Constitution, although the Constitution makes no provision therefor, Dr. Matthai also agreed to set up an Estimates Committee. The functions of these Committees have been outlined by him in the same budget speech as follows:-

> "There is a real distinction between the work of the Standing Finance Committee and the work of the proposed Estimates Committee. The Standing Finance Committee is concerned with specific proposals of expenditure by each Department of Government, but the Estimates Committee's business would be to make a comprehensive examination of expenditure in relation to the resources available

to .....

> to Government. The real business of the Estimates Committee would, therefore, be taking the policy and the objectives of Government (with which they are not concerned), to suggest how this policy and these objectives could be carried out with the least expenditure of public resources."

Dr. Matthai thought that the suggestions and criticisms which may be made by the Estimates Committee would give a useful direction and guidance to Government in the matter of regulating expenditure and that the knowledge that the expenditure of Government and of various Department of Government would be examined in detail by an independent authority set up by the House would act as a deterrent to extravagance in public expenditure.

4. It is not quite clear from Dr. Matthai 's speech whether the Estimates Committee will be in session even after the Appropriation Bill is passed or will finish its work as part of the budget discussion and before the Appropriation Bill is passed. The White Paper on the Budget of 1950-51 describes the Committee's functions as follows:-

> "Unlike the Railway estimates which are placed before the Standing Finance Committee before their presentation to Parliament, the general budget is not examined by any Committee of Parliament. While it is not possible, because of the size and complexity of the general budget and the very limited time available between its completion and its presentation to Parliament, to have it scrutinised by a Committee of the House at that stage the suggestion has been made that the estimates should be examined by a Committee of the House after it has been passed by Parliament, so that Government may have the advantage of the detailed examination of these estimates on behalf of the House. It has been decided to invite Parliament to set up an Estimates Committee to scrutinise the estimates during the course of the year. The Estimates Committee will not be concerned with matters of policy and its main function will be to consider how economies in public expenditure could be effected consistent with the policy on which the budget has been framed. The suggestions of this Committee will assist the Government both in effecting economies during the course of the year and in framing the budget for the ensuing year."

This would give the impression that the Estimates Committee was not expected to finish its labours as part of the passing of the budget but was to carry out its scrutiny

even thereafter with a view to see whether economy could be effected consistent with the policy underlying the estimates as passed by Parliament.

5. Apparently the Estimates Committee, the proposals for which were outlined as far back as 1933 by Sir James Grigg, is based on its counterpart, the Estimates Committee of the House of Commons. That Committee of the House of Commons is described as a "select committee" appointed each session for the consderation of the details of expenditure. The estimates are considered in England simultaneously by the Committee of Supply, which is a Committee of the whole House, and by a select committee, that is the Estimates Committee. The work of the Committee of Supply deals mainly with general policy and administration, the details being left to the select committee which is specifically debarred from matters of policy. In other words, the Estimates Committee is a small select committee intended to assist the House in its deliberations on the budget by applying its mind to questions of detail within the frameWork of the policy outlined in the budget. The Estimates Committee is empowered to examine any of the estimates presented to the House, to suggest the form in which the estimates might be presented and to report what economy consistent with the policy implied in the estimates might be effected. The Committee submits its report and that report can be taken into consideration on one of the days allotted for the discussion of financial business which culminates ultimately in the Appropriation Bill. From the description of the procedure and functions of the Committee as given in May's Parliamentary Practice, it does not seem that the Committee carries on its work even after the Appropriation Bill is passed.

6. The question for consideration is whether we should have both the Standing Finance Committee and the Estimates Committee or either of them. It must be made clear at the outset that the Constitution makes provision for neither

Committee .....

Committee and we should be loath to set up Committees of this kind by conventions which are to be engrafted on the Constitution; for in practice it would be difficult to evolve a smooth and satisfactory procedure for working out that convention. In any case, there is no necessity whatsoever for a Standing Finance Committee which has been preserved at the Centre merely as a relic of the past but which was discontinued in the Province from 1937. In my opinion, under a system of responsible Parliamentary government there is no scope for submitting to a Committee of the Legislature specific proposals of expenditure by each Department. The Cabinet which commands the confidence of the Legislature is competent to do that work and the Legislature gets the opportunity of discussing the policy underlying each item of new expenditure at the time of the budget discussion and the Appropriation Bill. I would, therefore, submit that we need not revive the Standing Finance Committee which was discontinued in 1937 as not consistent with responsible Parliamentary government.

7. The Estimates Committee on the strict British lines may, however, serve a useful purpose. The Legislative Assembly as a whole is not a body suited for taking detailed items into consideration. That body more properly concentrates attention on discussions of policy with the result that a detailed scrutiny of the items is not made by the Legislature. That was precisely the reason why the Estimates Committee was set up England to supplement the work of the House of Commons in its general discussion. As a select committee of the Legislative Assembly, doing its work as part of the budget discussion, an Estimates Committee might be of some help. Before, however, taking a decision to set up such an Estimates Committee, it might be useful to watch the working of the Estimates Committee set up by Parliament and to study the conventions which it establishes.

8 .....

8. I would like to add that writers on financial administration have not been very much impressed with the work of the Estimates Committee in England. As Hills in his Finance of Government says: "After weeks of deliberations on the Navy estimates, the only substantial recommendation was for a reduction in the supply of tobacco to sailors !" The reasons given for its ineffective work are that the Estimates Committee cannot go into questions of policy; that it cannot go into economies of expenditure because every vote on expenditure may be treated as a vote of no-confidence in the Cabinet; that its examination comes after the estimates have been presented and, therefore, discussions of the Committee have little effect; and finally that it is not assisted by technical experts, although the British Parliament has started recently the system of giving them such assistance.

9. In view of what has been said about the Estimates Committee in England and considering that it is an innovation in this country, which is to be engrafted on the Constitution, we might await the experience gained from the working of the Estimates Committee set up by Parliament.

Sd/- P.N.Lal.
15.3.
Remembrancer of Legal Affairs.

U.R. to Secy;, F.D. No. 3638 dated the 15th March 1950.

V.H.D./13.7
40.

OFFICE OF THE R.L.A.

Constitution of India. Articles 5 and 9.

Article 5 of the Constitution has to be read along with Article 9. Under Article 9 no person shall be a citizen of India by virtue of Article 5 or be deemed to be a citizen of India by virtue of Article 6 or 8 if he voluntarily acquires the citizenship of any foreign State. Under this Article if a person has voluntarily acquired the citizenship of any foreign State either before or after the commencement of the Constitution, he shall not get the benefit of Article 5 with the result that he cannot be considered to be a citizen of India. In this case Mr. Rodrigues appears to have his domicile in the territory of India at the commencement of the Constitution. Since he has been residing in Bombay since 1904, he could be considered under Article 5 to be a citizen of India. But the fact that he has obtained a Portuguese passport shows that he was also considered to be a citizen of Portugal. Whether a person has voluntarily acquired the citizenship of any foreign State is a question of fact in each case and unless Mr. Rodrigues is able to prove that he has not voluntarily acquired the citizenship of Portugal, he cannot be considered to be a citizen of India. Moreover, in this case, the certificate of domicile has been granted to him on the 16th February 1949. It will have to be ascertained whether after that date he has not changed his domicile. Before, therefore, Mr. Rodrigues is granted an Indian passport, it will be necessary to verify whether at the commencement of the Constitution, he was a citizen of India under Article 5 and if so, whether either before or after the commencement of the Constitution he has voluntarily acquired the citizenship of any foreign State.

Sd/- P.M.Lad.
25.4
Remembrancer of Legal Affairs.

U.R. to Passport Office, No. 5665, dated 26th April 1950.

Office of the R.L.A.

Since the papers were not submitted to H.E. the authentication by the Secretary is inoperative. The recommendation on record is, therefore, a nullity. That would not, however, invalidate the Act after assent is given to it. Under Article 255 of the Constitution no Act of the Legislature of a State and no provision in any such Act shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given where the recommendation required was that of the Governor, either by the Governor or by the President.

2. In these circumstances there is no necessity for any rectification at this stage. The assent itself will serve as the necessary rectification . The matter may, however, be brought to the notice of H.E. the Governor.

Sd/- P.M.Lad.
15.4
Remembrancer of Legal Affairs.

U.O. to H.D. (I) No. 259-Confl., dated the 17th April 1950.

V.M.D./13.7
4c.

Office of the R.L.A.

According to instruction III(a) of the Instructions issued by the Government of India regarding the procedure to be observed by the States for dealing with petitions for mercy from or on behalf of convicts under sentence of death, the petitions have in the case of Part A States to be sent to the State Government concerned for consideration and orders of the Governor. The question referred to the R.L.A. for consideration is whether it is necessary to submit such petitions to the Governor before issue of orders.

2. The general question raised at 'A' in the P. & S.D. note at p. 14 ante has been considered in R.L.A's opinion No. 11556 dated 3.12.1947. As pointed out in that opinion, cases where the provisions of the Constitution require the Governor to perform certain duties or to issue certain orders under his signature would ordinarily have to be shown to him before a final decision is taken. What other cases should be shown to the Governor before decision and what cases need not be shown to him is to be settled by the Rules of Business.

3. Although the power to suspend, remit or commute sentences including the sentence of death has been given to the State Government under sections 401 and 402 of the Code of Criminal Procedure, and that power has been retained by the Adaptation of Laws Order, 1950, the Constitution which is the paramount document provides in Article 161 in the Section entitled 'The Governor' that the Governor of a State shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The Governor may no doubt act in this matter with the aid and advice of the Council of Ministers; but the petitions will nevertheless have to

be submitted to him before final orders are passed thereon.

4. As regards the presumption raised by the H.D. in para. 3 of its note at p. 9 ante, it may be stated that the Acts which the Government of India has in view are the Acts exclusively falling within the ~~Exitem~~ Union List. Such Acts will include Acts which although passed by the Provincil Legislature before the commencement of the Constitution now relate to matters enumerated in the Union List.

Sd/- P.N.Lal.
4.5
Remembrancer of Legal Affairs.

U.R. to H.D. No. 6155, dated the 5th May 1950.

V.H.D./13.7
&c.

Office of the R.L.A.

Neither under the Government of India Act, 1935, nor under the Constitution there is any power given to the State Government to make rules regulating the procedure and conduct of business of the Public Service Commission. The only power given was to make regulations for determining the number of members of the Commission and conditions of service and also to make provision with respect to the number of members of the staff and their conditions of service (See Article 319). The rules made in the year 1937 in respect of the Bombay Sind Public Service Commission and later on in 1948 in respect of the Bombay Public Service Commission have thus no statutory authority. However, they were made with the consent of the Commission and, therefore, the Commission will continue to be guided by them in matters to which they apply. As I Understand the meaning of the U.O.R. from the Secretary, Public Service Commission, the Commission do not wish to treat the rules as inoperative or invalid, but they only intimate that fresh rules cannot be made for making provision for the additional matters as originally suggested by the Chairman.

2. Attention is invited to Entry No. 41 in the State List (List No. II) in the 7th Schedule of the Constitution of India. It would be feasible for the State Government to promote legislation under that entry whereunder provision can be made for the regulation of the procedure and

conduct of the Commission's business. With a view to put the matter on a valid basis the best ~~xxxxx~~ course would be to undertake appropriate legislation for the purpose.

Sd/- P.M.Ledu.
19.5

Remembrancer of Legal Affairs.

U. H. to P. & S.D. No. 6802 dated 18th May 1950.

V.M.D./13.7
40.

Office of the R.L.A.

Increase in house tax by Ghatkopar Municipality of Railway property. Railways (L.A.) Taxation Act, 1941. Constitution of India Art. 277. 285(2).

Attention is invited to the Advocate General's opinion No. 21, dated the 20th June 1940 forwarded to G.D. with u.o.r. No. 5764, dated the 25th June 1940, where the Advocate General has held that the municipalities can increase the existing rate. The R.L.A. in his opinion No. 6360, dated the 3rd October 1944, has held that the Advocate General's view is legally correct and if Government of India has taken a different view it is for this Government to decide which view to accept and act accordingly. It is not known which view was adopted by this Government and the Local Self Government and Public Health Department would be in a better position to say in this matter. These taxes are now saved by Articles 277 and 285(2) of the Constitution of India.

Sd/- P.M.Lad.
11.3
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 3473, dated the 18th March 1950.

V.M.D./13.7
&c.

Office of the R.L.A.

The view taken by Secretary, Education Department, in his note at page 25 ante is correct. In virtue of entry 26 in the Concurrent Legislative List it would be competent to the State Legislature to enact a law for setting up a Council of Education and endow it with authority to declare who may or may not practise the legal profession in Courts.

Sd/- P.M.Lad.
26.5
Remembrancer of Legal Affairs.

U.R. to E.D. , No. 364-Conf1, dated the 27th May 1950.

V.M.D/13.7
4c.

Office of the R.L.A.

The power to issue passports to British subjects and British protected persons was a prerogative of the Crown which was delegated by His Majesty to His Excellency the Governor General with authority in turn to delegate the duty to such servants of the Crown in India as he may appoint. The delegation made by His Majesty in the year 1937 to the Governor General to issue passports in India does not appear to have been made under the Government of India Act, 1935. As stated by the Government of India in their letter of 29th September 1937, the issue of passports did not fall within any of the items mentioned in the 7th Schedule to the Government of India Act, 1935. In pursuance of the authority given to him His Excellency the Governor General had delegated to His Excellency the Governor of Bombay the function of x issuing passports to British subjects and British protected persons with authority to delegate the function to such Officer or Officers subordinate to him as he may deem appropriate. In their letter dated the 4th January 1946, the Government of India stated that so far as the Centre was concerned His Excellency the Governor General had directed that the issue of Passports should continue to be dealt with in the External Affairs Department and suggested that the Governor should decided which Department of the Provincial Government should deal with the subject. Accordingly R.L.A. in his opinion No. 4453, dated the 20th June 1946 advised that as in the case of the Centre the orders have been passed by the Governor General so in the case of the Province it would be necessary for the Governor to pass similar orders; that the Governor may, therefore, pass anorder stating which department should deal with the subject of passports, and that since the power to delegate in turn his function

of issuing passports had been given to the Governor in his individual capacity as the Governor of the Province, it would be for the Governor to pass an order delegating his functions to the officers he deemed appropriate. The Governor thereupon delegated to the Chief Secretary and to the Passport Officer the function of issuing passports and also directed that all cases of doubt should be referred to the Government of India in the External Affairs Department who will obtain the orders of His Excellency the Governor General with whom the final decision rested. The subject was assigned to the Political and Services Department as a subject appurtenant to the prerogatives of the Crown.

2. The question was raised again in the changed context after the 15th August 1947 and the R.L.A. recorded the following opinion :-

"It is doubtful whether the ~~result~~ omission of sections 2 and 3 of the Government of India Act can be construed to mean that all prerogatives of the Crown have ceased and have passed to the Governor General, although it has sometimes been argued that, where the sequality of status of a Dominion has been asserted, every royal prerogative has by necessary intendment passed to the Governor General (see p. 209 of Keith's Dominions as Sovereign States). The present delegation by the Governor General is consistent with either view that the Governor General is exercising the prerogative of the Crown as delegated to him or is exercising a prerogative which has passed to him by necessary intendment. In any case, this is a question for the Government of India to decide. It is evident from the telegram sent by the Government of India on the 22nd June 1948 that the Governor General has assumed that the function of issuing passports to British subjects and British protected

persons is vested in him and that he could delegate the same to His Excellency the Governor of Bombay. The power to issue passports is independent of any statutory provision and does not fall under any of the items mentioned in the Seventh Schedule to the Government of India Act, 1935. The function of issuing passports is, therefore, outside the scope of section 2 124 of the Government of India Act, 1935." (See R.L.A's opinion No. 468-Confl, dated the 23rd August 1948).

3. No question of any prerogative now survives after the Constitution came into force. Entry No. 19 in the List I (Union List) in the Seventh Schedule to the Constitution includes the subject of "passports and visas." Under article 73 of the Constitution subject to the provisions of the Constitution the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Under article 53 the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the constitution. It would follow, therefore, that the Union Government can alone exercise the executive power with respect to the subject of passports and visas and this executive power is vested in the President who can exercise it directly or through the officers subordinate to him. Of course, the President will in his turn be guided by the advice of the Council of his Ministers.

4. Under Article 155 the Governor is appointed by the President. Under article 156 "the Governor holds office during the pleasure of the President." Therefore, the Governor can be said to be an officer subordinate to the President. It will be competent to the President under article 53 to delegate to the Governor the executive authority in relation to passports and visas and authorise him to sub-delegate such authority

or function to other subordinate officers. Even otherwise, the Union Government can select the officers of the States for discharging their executive powers if the State consents or does not object and then no constitution objection can arise. The delegation made in the Government of India's letter No. F. 10-P-V(I)/50, dated 6th April 1950 must thus be viewed as a delegation of authority made by the Union Government through the President (as the executive head of the Union Government) to the Governor individually and through him to certain named officers. The Governor and the named officers will act under the authority delegated to them and they will be responsible to the President. Thus passports and visas will be issued by the President as the executive Head of the Union Government through the Governor and the named officers. The State Government as such would have no connection with that function. Such delegation could have been provided for by Central legislation on the subject of passports; and its quality does not change because it is made in exercise of executive authority.

5. This delegation is distinct from the entrusting of a function under article 258 of the Constitution which reads as follows: "Notwithstanding anything in this constitution the President may with the consent of the Government of a State entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends." The entrustment, be it noted, is to the Government of the State; and once such entrustment is made and if it is unconditional the Government of the State would be responsible for discharging the function. In the case of delegation, however, the responsibility still remains with the Union Government and the Governor and

the Officers are merely being used as instruments through whom the Union Government discharge its own functions.

6. The only constitutional construction which can be put upon the Government of India's letter is that instead of 'entrusting' the function in relation to passports and visas to the State Government under article 258 they preferred to retain the function with themselves and to discharge it through their delegates -- -- the Governor and the Officers nominated by him. In adopting this course they might have been influenced by the fact that passports and visas should more appropriately be dealt with by the External Affairs Department as the ultimate authority rather than by the respective State Governments.

V.M.D./13.7

Office of the R.L.A.

Constitution of India. Articles 269(1), 277 with 265.

It is clear from the provisions of articles 269(1) and 277 of the Constitution that the tax on advertisement in newspapers which was levied by the Bombay State by Bom. Act II of 1949 before the commencement of the Constitution continues to be valid and can be levied and collected by the Bombay State Government until the Parliament passes an Act contrary to the provisions of that Act. It is true that the Bombay Government can make a recommendation to the Union Government to levy a tax on advertisements in newspapers under article 259 but it is open to the Union Government to refuse to levy such a tax and collect the same on grounds of expediency or otherwise for although article 269 uses the word "shall" that is done for the purpose of emphasizing that in the scheme of distribution of revenues the power shall be exercised by the Government of India and not by the Government of a State. Article 269 has to be read with article 265 and when so read it only means that Parliament to refuse to pass any legislation for the purpose. The reply to the question is therefore in the negative.

Sd/- P.M.Lad.
3.8
Remembrancer of Legal Affairs.

U.R. to F.D. No. 11051 dated 4th August 1950.

V.M.D./13.7
4c.

Office of the R.L.A.

Reservation of posts for prohibition affected persons. Constitution of India Article 16(4).

Under Article 16(4) of the Constitutions reservation of appointments or posts would be possible only in favour of any backward class of citizens. Whether or not a certain class of citizens is backward would depend upon the percentage of literacy in that class and its economic n condition and social status. Those who are affected by the prohibition would form a class of sufferers but by no means a backward class within the meaning of Article 16(4). Consequently any reservation of appointments in favour of such sufferers would be hit by Article 16(1) of the Constitution.

Sd/- P.M.Lad.
11.8
Remembrancer of Legal Affairs.

U.R. to E.D. No. 11474, dated the 11th August 1950.

V.M.D./13.5
4c.

Office of the R.L.A.

Constitution of India. Article 26.

R.D. Circular No. 1441/49 dt. 29.7.49.

Although under article 26 every religious denomination or any section thereof has the right subject to public order, morality and health to establish and maintain institutions for religious and charitable purposes there is nothing in the Constitution which prohibits the State from refusing grant-in-aid to trusts created for the benefit of any particular caste or creed. Condition (3) in para. 2 of the R.D. Circular No. 1441/49 dated 29.7.49 is not open to objection on any constitutional ground.

Sd/- P.M.Lad.
21.8
Remembrancer of Legal Affairs.

U. R. to R.D. No. 11958, dated the 22nd August 1950.

V.M.D./14.7
4c.

Constitution of India. Article 285(2).

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Government of India Act, 1935.

Section 154 and 316.

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Railways (Local Authorities Taxation) Act, 1941. Section 3.

Before the railway line owned by the Katheran Steam Tramway Company was purchased and taken over by the G.I.P. Railway Administration in 1948 it was liable to taxation by the Katheran Municipality. After it was purchased by the G.I.P. Railway Administration the property vested in His Majesty for the purposes of the Government of the Federation within the meaning of section 154 of the Government of India Act, 1935. That section provides as follows:

"Property vested in His Majesty for the purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State:

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall so long as that tax continues, continue to be liable, or to be treated as liable, thereto."

Under the proviso it was not necessary that any property to be liable or to be treated as liable to any tax should have been vested in His Majesty before 1.4.1937. Therefore the railway line owned by the Katheran Steam Tramway Co. which vested in the Central Government on 1.4.1948 would continue to be liable to the tax levied by the Katheran Municipality in respect of that line. That liability would, however, continue until any Federal law otherwise provided. The expression "Federal Law" appearing in section 154 meant under section 316 of the Government of India Act, 1935 as a law of the Indian Legislature. In 1941 the Indian Legislature passed an Act called the Railways (Local Authorities' Taxation) Act, 1941. Under

Section :...

section 3 of that Act in respect of property vested in His Majesty for the purposes of the Central Government, being property of a railway, the railway administration shall be liable to pay any tax in aid of the funds of any local authority, if the Central Government, by notification in the official Gazette, declares it to be so liable."

That section can be considered therefore as otherwise providing within the meaning of the proviso to section 154. The position therefore was that until and unless a notification was issued by the Central Government under section 3 of the Railways (Local Authorities' Taxation) Act, 1941 the property in question could not be considered as continuing to be liable or to be treated as liable to taxation by the Matheran Municipality. As in fact no notification seems to have been issued under section 3 of the aforesaid Central Act the property in question was not liable to pay the Municipal taxation before the commencement of the Constitution and therefore clause (2) of Article 285 of the Constitution will not be available to the Municiplaity for the purpose of levying taxation in respect of the property in question until Parliament by law otherwise provides. The Central Act namely, the Railways (Local Authorities' Taxation(Act, 1941 is not a law made by the Parliament and no notification under section 3 of that Act can now be issued. If it is intended that the property in question should be liable to Municipal taxation it will be necessary for Parliament to enact a law as contemplated by clause (1) of Article 285.

Sd/- P.M.Lad.
21.8

Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H..D. No. 11959, dated the 27nd August 1950.

V.M.D./14.7
46.

Office of the R.L.A.

Uchad Confiscated Lands Restoration Order, 1948 : Constitution of tribunal under.

Under para. 3 of the Uchad Confiscated Lands Restoration Order, 1948, as it stands a Tribunal cannot be consitituted unless all the three members are nominated. There is no provision in the Order that on the failure of the Thakore to nominate a member within a prescribed period, the power shall be exercised by Government. As long as the Thakore is reluctant to nominate a member it is not possible to have a validly constituted Tribunal. The only alternative in that case would be to amend para. 3 of the Order by having recourse to legislation. It appears doubtful whether such an amendment can be made by having recourse to para. 12 of the Order which empowers Government to make an order for removing any difficulty in the carrying out of the Order. Besides article 4(4) of the Bombay (Enlargement of Area and Alteration of Boundaries) Order, 1948, under which the Uchad Confiscated Lands Restoration Order, 1948, has been made itself provided that no order could be made under that article after the expiration of six months from the date of the commencement of the former Order.

Sd/- P.M.Lad.
1.9
Remembrancer of Legal Affairs.

U.O. to P. & S.D. No. 12597, dated the 2nd Sept.1950.

V.M.D./14.7
40.

Office of the R.L.A.

Constitution of India, article 5. Whether one Mrs. Dorothy Zinsenhein is an Indian national.

The R.L.A. is requested to advise as regards the nationality of one Mrs. Dorothy Zinsenheim who has applied for the grant of an Indian Passport for travelling to the U.K. and countries on the Continent. Mrs. Zinsenheim first came to India in September 1947 after her marriage in London with Mr. Francis Zinsenheim who, it appears, is a citizen of India within the meaning of Article 5 of the Constitution.

2. "The nationality of an individual is his quality of being a subject of a certain State and therefore its citizen" (Oppenheim's International Law, 7th Edn. Volume I pages 535-536). Article 5 of the Constitution of India provides who can be considered to be a citizen of India at the commencement of the Constitution Every person having his domicile in the territory of India and possessing one of the following qualifications is, under that article, a citizen of India:-

(a) being born in the territory of India;

(b) either of the parents being born in the territory of India;

(c) being ordinarily resident in the territory of India for not less than 5 years immediately preceding the commencement of the Constitution.

Since the lady has married a gentleman whose domicile is certified to be Indian she too has acquired Indian domicile. But that is not sufficient to make her a citizen of India; as, in addition, she does not possess either of the qualifications specified at (a), (b) or (c) above. She cannot therefore be considered to be of Indian nationality.

Sd/- P.M.Lad.
22.9
Remembrancer of Legal Affairs.

U.R. to Passport Officer, No. 13550 , dated the 25th Sept. 1950.

Office of the R.L.A.

Article 373(2) of the Constitution provides for only two things: (1) members of the Public Service Commission who were holding office immediately before the commencement of the Constitution becoming members of the Public Service Commission on the commencement of the Constitution, and (2) stabilising their term of office at the term which was granted to them under the rules beforethe commencement of the Constitution. The latter part of clause (2) of article 2 373 reads as follows:

> "shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members."

The words "as determined" go with the words "term of office". In other words, the rules which were applicable before the commencement of the Constitution are preserved by this clause only in so far as they apply to the term of office. This clause cannot be used for continuing the rules for purposes other than the term of office.

2. However, article 372(1) continues all the law in force in the territory of India immediately before the commencement of the Constitution until it is altered or repealed or amended by a competent Legislature or other competent authority; but that is subject to the other provisions of the Constitution. "Law" in this context would, under Explanation I to article 372, include a regulation made by the Governor as a competent authority under section 265(2) of the Government of India Act, 1935. The regulations made by the Governor under that section can continue subject to the provisions of the Constitution Article 2 316 of the Constitution deals with the power of the Governor to make regulations, and that power under clause (a) of that article is confined to

the determination of the number of members of the Commission and their conditions of service. The power to make regulations in respect of tenure of of office of the members has been taken away, and that has been advisedly done, because, the Constitution in article 316 itself fixed the tenure, and it is the intention that the security of tenures should not be interfered with by any regulations or by any law. The old regulations will, therefore, continue in so far as they are covered by the powers given by article 313A, i.e., only in respect of the determination of the number of members and their conditions of service; but in all other respects they will cease to be operative as regulations. Granting of leave to a member is a matter which falls within the conditions of service, and, therefore, the the old regulations on the question of granting of leave to a member can continue in force. Making an acting appointment in the place of a member who has proceeded on leave is not a matter of conditions of service. On the other hand, making such appointments would be inconsistent with article 316, which definitely fixes a tenure and as in the case of High Court Judges does not contemplate an acting appointment. The underlying intention is that a member of the Public Service Commission should be guaranteed a fixed tenure as a means towards the end of his independent discharge of ~~his~~ duties. In my opinion therefore, the regulations in so far as they permit a short term or an acting appointment do not survive. Not only that, but it would not also be permissible to make a law with reference to entry 41 in List II providing for short term or acting appointments, as that would be opposed to the letter and the spirit of the Constitution.

3. On the question as to whether it would be permissible not to fill the vacancy caused by a leave,

227 55.

attention is invited to R.L.A.'s opinion No. 4784, dated 2nd May 1949. As pointed out in that opinion, as in the case of the Government of India Act, but more so under the Constitution, this cannot be achieved by making regulations, and there is no provision for making non-statutory rules. However, this is a matter which can be suitably dealt with by legislation with respect to entry 41 in List II, which may provided for quorum, for rules of business and for the validity of acts notwithstanding the absence of a member on leave etc.

Sd/- P.L.Lal.
25.9
Remembrancer of Legal Affairs.

U.O. to L. & S.D. No. 3537, dated 26th September 1950.

V.M.D./14.7
4c.

Office of the R.L.A.

The case was discussed with the Secretary, Home Department.

2. Article 161 of the Constitution is to the effect that the Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The power to suspend, remit or commute corresponds to the powers given by Chapter 29 of the Code of Criminal Procedure; whereas the other powers, namely, of granting pardons, reprieves, respites or remissions conferred by the earlier part of the article is apparently different from the powers given by chapter 29 of the Code, which does not make provision for such powers.

3. R.L.A's opinion No. 6155 dated 5.5.50 was based on the assumption that the power to suspend, remit or commute sentence which has also been retained in the Code of Criminal Procedure after adaptation is the same as the corresponding power and that its exercise must be governed by the Article of the Constitution in preference to the provisions in the Code, and that therefore, the papers ks should be submitted to the Governor before the exercise of the power. It is, however, possible to take the view that even in the matters of suspension, remissions and commutations of sentences the power conferred on the Governor by Article 161 is of the nature of a prerogative power and is in addition to the power given to the State Government under the Code of Criminal Procedure. Upon that view the power under the Code, although exercisable eventually in the name of the

Governor,

Governor, can be regulated by rules of business which may provide that the papers need not be submitted to the Governor before orders are passed; whereas if it is proposed to exercise the power under article 161 even in matters of suspension, remission and commutations of sentences, the papers must be submitted to the Governor before final orders are passed. Even in the latter case, the Governor will no doubt act upon the advice of the Council of Ministers.

4. It is for the Home Department to consider whether in view of this position it would at all be necessary to refer the case to the Government of India.

Sd/- P.N.Lad.
Remembrancer of Legal Affairs.

U.O. to H.D. No. 14330 dated 12th October 1950.

V.M.D./14.7
4c.